FOR ARGUMENT

Supreme Court, U. S.
FILED
APR 13 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-680

RONALD R. HUTCHINSON,
Petitioner,

v.

WILLIAM PROXMIRE and MORTON SCHWARTZ,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PEITIONER'S REPLY BRIEF

MICHAEL E. CAVANAUGH
DAVID E.S. MARVIN
FRASER TREBILCOCK DAVIS & FOSTER
1018 Michigan National Tower
Lansing, Michigan 48933
Telephone 517-372-0235

Counsel for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

SUBJECT INDEX

Page

TABLE OF CITATIONS i

REPLY ARGUMENT

The Respondents Have Misrepresented the Issues in This Case and Have Improperly Raised Additional Questions Not Presented in the Petition for Certiorari 1

The Respondents' Statement of the Case is Inaccurate 6

The Respondents' Press Release and Newsletters Are Not Entitled to Absolute Immunity Under the Speech or Debate Clause 13

The Tortious Phone Calls During Which Respondent Schwartz Defamed Dr. Hutchinson and Urged Various Agencies to Terminate His Funding Are Not Entitled to Absolute Speech or Debate Immunity 25

Dr. Hutchinson Was Not a Public Official 27

Dr. Hutchinson Was Not a Public Figure 33

The Record Presents a Genuine Issue of Material Fact Regarding the Respondents' Malice 36

CONCLUSION AND RELIEF SOUGHT 40

TABLE OF CITATIONS

CASES:

Alexander v. *Cosden Pipe Line Co.*, 290 U.S. 484 4
Bothwell v. *United States*, 254 U.S. 231 4
Clark v. *Pearson*, 248 F. Supp. at 193-4 .....29, 30-31, 32
Curtis Publishing Company v. *Butts*, 388 U.S. 130 (1967) 33
Doe v. *McMillan*, 412 U.S. 306, 314 (1973) .. 3, 14, 22. 23, 26
First National Bank of Boston v. *Bellotti*, 435 U.S. 765 (1977) 36
Gertz v. *Welch*, 418 U.S. 323 (1974) 33, 34, 37
Gravel v. *United States*, 408 U.S. 606 (1972) ..14, 21, 26, 27

Page

Guam Federation of Teachers, Local 1581, A.F.T. v. *Ysrael*, 492 F.2d 438 (1974) 39
King v. *Creevy*, 1 Maule & Selw. 273 15
Le Tulle v. *Scofield*, 308 U.S. 415, *reh. den.*, 309 U.S. 694 4
Long v. *Ansell*, 69 F.2d 386 (D.C. C.A. 1934), *affirmed* 293 U.S. 76 (1934) 20
Lucas v. *Alexander*, 279 U.S. 573 4
McGovern v. *Martz*, 182 F. Supp. 343 (D.C. D.C., 1960) 16, 20, 21
NLRB v. *Express Pub. Co.*, 312 U.S. 426 4
New York Times Company v. *Sullivan*, 376 U.S. 254, 283 n.23 (1964) 27, 28, 33, 35, 36, 39
Rex v. *Abington*, Esp., 226, Peake 310 (1795) 20
Rex v. *Creevy*, 1813, 1 Maule & Selwyn 273; 3 Eq. N.P. Cases, 228, 1 M. & S. 273 (1813) 14, 16, 20
Rex v. *Lord Abington*, 1795, 1 Esp. N.P. Cases 228 .. 14, 20
Rosenblatt v. *Baer*, 383 U.S. 75 (1966) 27, 28, 30, 33
Terminal R. Assoc. v. *United States*, 266 U.S. 17 4
United States v. *Brewster*, 408 U.S. 501 (1972) 14, 19, 21, 23, 25, 26
United States v. *Johnson*, 383 U.S. 169 (1966) 26
United States v. *Storer Broadcasting Co.*, 351 U.S. 192 4
Watkins v. *United States*, 354 U.S. 178 (1957) 23

COURT RULES:

Supreme Court Rule 23(1)(c) 3, 4

OTHER AUTHORITIES:

Congressional Research Service, The Constitutional Privileges from Arrest and of Speech or Debate of Members of Congress, United States Constitution, Article I, Sec. 6 (JK 1052 A-73-86 A) (3rd Edition 1972) 21

Justice Story, Commentaries on the Constitution of the United States, Vol. II, Sec. 83 .....15, 19

1 Kent's Commentaries 249, note c (8th Ed. 1854) ... 16

Stewart, "Or of the Press," 26 Hastings Law Journal, 631 (1975) 36

Page

T. E. May Treaties on the Law, Privileges, Proceedings and Usage of Parliament 48-66 (16th ed. E. Fellowes & T. G. B. Cocks 1957) 15

Wade, The communicative Torts and the First Amendment, 48 Mississippi Law Journal 671, 698 (1977) 36

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-680

RONALD R. HUTCHINSON,
Petitioner,

v.

WILLIAM PROXMIRE and MORTON SCHWARTZ,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PEITIONER'S REPLY BRIEF

THE RESPONDENTS HAVE MISREPRESENTED THE ISSUES IN THIS CASE AND HAVE IMPROPERLY RAISED ADDITIONAL QUESTIONS NOT PRESENTED IN THE PETITION FOR CERTIORARI

Questions Presented in the Respondents' Brief are not the questions presented in this case:

1. The Respondents' first question presented was as follows:

> "1. Under the Speech or Debate Clause, may a United States Senator criticize public spending in

> Congressional statements repeated in a press release and discussed in constituent newsletters without being subject to suit by the recipient of that spending?" (Br. 1)

The language of this first question contains at least three misleading implications. First, the phrasing of the Speech or Debate issue indicates that a Senator's right to criticize public spending is in dispute. The record will reflect, however, that the real issue is not whether a Senator may criticize public spending, but whether an individual Senator, acting outside the halls of Congress, enjoys unrestricted and absolute immunity to engage in the wide-spread publication of malicious defamation regarding a private individual.

The second misleading aspect of the Respondents' first question is the reference to "Congressional statements." For the sake of clarity, it should be emphasized that the Petitioner has never challenged Respondent Proxmire's right to insert his defamatory press release into the *Congressional Record,* nor has he challenged any committee hearings, voting or other legislative activities. On the contrary, the present case is concerned only with the Respondents' publicity releases, press interviews, political newsletters, defamatory phone calls and appearances on television and radio talk shows.

The third error in this question concerns the reference to "Congressional statements repeated in a press release." This phrase confuses the true chronology of publication by misrepresenting the press release as being a subsequent republication of the alleged Senate floor speech. In fact, it is undisputed that the press release was actually distributed to the news media approximately three days prior to the date that it was

either read on the Senate floor or handed to the Clerk for insertion into the *Congressional Record.* (A.167). Thus, the press release constituted the original publication of the Respondents' defamatory remarks, rather than a republication of his floor speech, if any. It is the Petitioner's contention that the chronology of publication reveals that the alleged floor speech was merely an attempt to add substance and immunity to a personal publicity release. Of course, Speech or Debate immunity would not be available to the Respondents even if the press release had been distributed after its insertion into the *Congressional Record. Doe* v. *McMillan,* 412 U.S. 306, 314 (1973). In the interest of accuracy, however, the true chronology of publication should not be confused.

2. The Respondents' second Question Presented raised the following issue:

> "2. Did the Court of Appeals err in finding that investigation and oversight by a United States Senator and his aide into the extent and justification of agency spending is not legitimate legislative activity, immune from question under the Speech or Debate Clause?" (Br. 2)

This issue is not properly before this Court. Supreme Court Rule 23(1)(c) provides in pertinent part that "only the questions set forth in the Petition [for Writ of Certiorari] or fairly comprised therein will be considered by the Court." In the instant case, the only question regarding Speech or Debate immunity which was presented in the Petition for Writ of Certiorari was the following:

> "Are the press releases and newsletters of a member of Congress entitled to absolute immunity un-

der the Speech or Debate Clause of the United States Constitution?" (P. 2)

The above-cited question is clearly restricted to the Respondents' press releases and newsletters and does not extend to the Respondents' other conduct which the Court of Appeals found to be outside the scope of Speech or Debate immunity. Therefore, under the terms of Supreme Court Rule 23(1)(c), the Respondents' second Question Presented is not properly before this Court.

Furthermore, there is abundant authority for the proposition that a respondent who fails to Cross-Petition for Certiorari may not attack the judgment below for the purpose of obtaining a modification in his favor. *See e.g., United States* v. *Storer Broadcasting Co.,* 351 U.S. 192; *NRLB* v. *Express Pub. Co.,* 312 U.S. 426; *Le Tulle* v. *Scofield,* 308 U.S. 415, *reh. den.* 309 U.S. 694; *Alexander* v. *Cosden Pipe Line Co.,* 290 U.S. 484; *Lucas* v. *Alexander,* 279 U.S. 573; *Terminal R. Asso.* v. *United States,* 266 U.S. 17; *Bothwell* v. *United States,* 254 U.S. 231. In total disregard of this well-established principle, the Respondents' have dedicated a substantial portion of their Brief to a discussion of Respondent Schwartz's tortious phone calls and the so-called "investigative function" of Congress. In the absence of a Cross-Petition for Certiorari, that portion of the Respondents' Brief and the corresponding sections of the Amicus Briefs should be disregarded. In light of this Court's authority to consider even those issues which are not properly presented by the parties, however, a responsive section addressing this issue has been included in this Reply Brief.

3. In addition to overstatement, the Respondents' third Question Presented also attempts to raise a new question not presented in the Petition for Writ of Certiorari. Even though the Petition, as well as the Court of Appeals Decision and the Petitioner's Brief, did not address the issue of Dr. Hutchinson's possible status as a "public official," the Respondents' have attempted to raise this issue in addition to the "public figure" issue which is properly before the Court. In accordance with the authorities cited on page 4 of this Brief, the portion of the Respondents' Brief which addresses the "public official" issue should be disregarded. Again, however, a responsive section has been included in this Reply Brief for reference in the event that this Court decides to address the issue.

4. The Respondents' fourth Question Presented reads as follows:

> "4. Is a material issue of 'actual malice' presented where the allegedly defamatory remarks are either expressions of opinion, or obviously colloquial language, reasonably descriptive of the factual situation described?" (Br. 2)

This question completely misrepresents the malice issue presented in the instant case. First of all, the Respondents have conveniently overlooked the evidence demonstrating their past pattern of malicious defamation in connection with the "fleecing" of social scientists. Secondly, their statement of the issue fails to even mention their awareness of the truth and their admitted knowledge of the falsity of some of their statements. Third, it is a distortion of the facts to indicate that all of the Respondents' defamatory remarks were either "expressions of opinion or obviously colloquial language, reasonably descriptive of the factual situation

described." It certainly was not "opinion or obviously colloquial language, reasonably descriptive of the factual situation" to essentially charge Dr. Hutchinson with fraudulently obtaining funding for "duplicative" research projects, especially when the charge was totally unfounded. (P. 85). Similarly, it was not "opinion or obviously colloquial language, reasonably descriptive of the factual situation" for Proxmire to grossly distort the nature and extent of Dr. Hutchinson's research by falsely alleging that "the Government paid a half million dollars to find out that anger, stopping smoking, and loud noises produce jaw clenching in people." (P. 84). In fact, none of the defamatory falsehoods or ridicule involved in Dr. Hutchinson's Complaint should be dismissed as "reasonably descriptive" opinions or colloquialisms. Consequently, the fourth "Question Presented" in the Respondents' Brief, just as the preceding three questions, should be disregarded in favor of the actual questions set forth in the Petition and supported in the record below.

THE RESPONDENTS' STATEMENT OF THE CASE IS INACCURATE

Much of the artful hyperbole and selective reporting contained in the Respondents' slanted presentation of the facts does not merit a detailed response since the actual facts are accurately set forth in the Petitioner's Statement of the Case.[1] Some of the Respondents'

[1] For example, the record clearly reveals that the initial document which the Respondents issued to the news media was a publicity release laden with sarcastic ridicule, rather than a scholarly "report" as the Respondents have alleged. (Br. 3). Similarly, the Respondents' unqualified assertion that "the speech was delivered on the floor of the Senate" (Br. 4) is inconsistent with Proxmire's deposition testimony that he is not certain whether he actually read his press release on the floor of the Senate or merely handed it to the Clerk for insertion into the *Congressional Record*, although he presumes he read it on the floor. (A. 220-221; 234-235).

Statements, however, are sufficiently misleading to warrant the following comments:

1. On page 4 of their Brief, the Respondents indicate that their press release "accurately identifies" the research findings in connection with Dr. Hutchinson's work.[2] Contrary to this unsupported assertion, the Respondents' description of Dr. Hutchinson's research findings was a complete travesty. (A. 282-285; 287-298). In fact, one of the primary bases for the Petitioner's initial Complaint was that the Respondents knowingly and maliciously misrepresented his research in order to facilitate their caustic ridicule.[3]

2. Immediately following their unsupported assertion of factual accuracy, the Respondents state that, "to that factual base, Senator Proxmire added his opinion that the grants were wasteful, worthless and an inappropriate expenditure of Government Funds." (Br. 4-5). This description of the press release is so incom-

[2] The Respondents also claim to have "accurately identified" the cost figures, but many of the figures in the release (p. 84-86) are not even consistent with the figures contained in the Respondents' own exhibits purporting to describe Dr. Hutchinson's funding. (A. 306-309; 312). For example, Respondents' Trial Exhibit 83 contradicts the press release with respect to the amount of Dr. Hutchinson's first National Science Foundation (NSF) Grant, the date of the second NSF Grant, the amount of the third NSF Grant and the total figure for funding provided by ONR (A. 312).

[3] The true nature of Dr. Hutchinson's research was explained in the agency reports which were received and reviewed by the Respondents prior to the issuance of their press release (See Petitioner's Brief, pp. 7-9).

plete as to be unconscionable. The text of the press release (P. 84-86) clearly reveals that the Respondents also charged the Petitioner with personally receiving almost $500,000.00 in Government Funds, with "grantsmanship," with making "a fortune from his monkeys," with making "a monkey out of the American taxpayer," with spending "a half million dollars to find out that anger, stopping smoking, and loud noises produce jaw clenching in people" and with obtaining funding for projects which were "perhaps duplicative." (P. 84-86). These defamatory allegations of improper and perhaps illegal activity extend far beyond any mere statement of opinion that the grants were wasteful and inappropriate.

3. On page 5 of their Brief, the Respondents state that, "the press release was sent to the Senate Service Department on April 15, 1975 for review and approval of its content in conformance with Senate Rules." This statement is somewhat misleading in that it falsely implies that the Senate Service Department made some attempt to verify the accuracy and/or non-defamatory nature of the Respondents' press release or otherwise endorse the release as an official publication of the entire Senate. In fact, the Senate Service Department undertook no such effort, but merely reviewed the press release for conformity with the Senate's Franking Regulations. (P. 28).

4. The Respondents state, on page 5 of their Brief, that, "the release date of the press release was not until the morning of April 18, 1975, the same date of the Senate speech." This reference to the "release date" *printed* on the press release is technically correct,

but one of Proxmire's own staff members has admitted that the press release was *actually* released on April 15, 1975. (A. 167).

Knowledge of this actual release date should also dispel the false impression, created by the Respondents, that Dr. Hutchinson distributed his responsive press release prior to the dissemination of Proxmire's release. (Hutchinson Depo., p. 154).

5. Also on page 5 of their Brief, the Respondents address the telephone conference between Dr. Hutchinson and Morton Schwartz prior to the issuance of the press release. According to the Respondents, Hutchinson reviewed the release and then merely "objected generally to what he considered the unfair evaluation of his work." This summary neglects to point out that Dr. Hutchinson said, "the entire release is a travesty or mocking of the truth. It's a total distortion . . . from beginning to end it was a falsehood." (A. 247).

6. In like manner, the Respondents assert, at page 6, that Dr. Hutchinson's responsive press release "did not challenge any of the factual statements in Proxmire's speech." Although Proxmire's floor speech, if any, is not at issue in this case, it is certainly wrong to imply that Dr. Hutchinson did not challenge any of the identical, factual misstatements contained in the Respondents' press release. In fact, the entire reply was, by its title and terms, a direct challenge to the falsity of the release. For example, Dr. Hutchinson responded to the gross mischaracterization of his research by explaining the true nature of his work. (A. 83-84). Also, in direct response to the Respondents' allegation that he may have received funding for "du-

plicative projects," Dr. Hutchinson briefly explained the agency review process and noted that "each agency is always fully informed of other support which the researcher is currently provided or which is under review. Funding by these agencies is tailored to support specific projects for which no other support is provided." (A. 84). Thus, it can hardly be said that Dr. Hutchinson's reply did not challenge the factual misstatements in the Respondents' press release.

7. According to page 6 of the Respondents' Brief, "the first press coverage of the funding issue" included "extracts of Hutchinson's release," the charge of Proxmire's "disservice to his constituents and to the country," and "statements by the agencies defending the merit of the funding." Although these statements are partially true, it is inaccurate to state that these responsive statements were included in all of the initial press coverage. The *New York Times* article of April 19, 1975, for example, made no mention whatsoever of any of the three responsive statements which the Respondents' assert were "included in the original stories." (Pl. Ex. 37).

8. In describing the various publications of Proxmire's defamatory remarks, the Respondents state that "no mention was made of Dr. Hutchinson" during the Mike Douglas television show (Br. 8). Although it is true that Dr. Hutchinson's name was not specifically mentioned on this television show as it was in the press release, the first newsletter, and the other television and radio shows (P. 84-88; Pl. Exs. 8, 9), the Respondents fail to mention the affidavits contained in the record indicating that Dr. Hutchinson was sufficiently identified so as to enable certain listeners to recognize

that he was the subject of Proxmire's defamatory ridicule. (Pl. Exs. 10, 11).[4]

9. In stating, on page 8 of their Brief, that "no texts of broadcasts are known" other than the Mike Douglas Show and the Affidavit regarding the Bob Barry Radio Show, the Respondents clearly imply that the record is devoid of any evidence regarding the substance of the other public interviews. This implication is deceptive in light of the affidavits and deposition testimony concerning the content of additional radio, television and press interviews. (Pl. Exs. 8, 9; Hutchinson Depo. p 189).

10. Near the end of the Respondents' statement of the case, they cite rather extensively to a State Audit Report which was not even released to the public until after the Respondents' press release had received nationwide publicity. The allegations contained in the Audit Report are not established findings of fact nor have they led to any criminal or civil charges against Dr. Hutchinson. In fact, Dr. Hutchinson vigorously disputes the Audit's findings and has demanded a retraction. (Hutchinson Depo. p 116). In the context of the instant case, the Respondents' repeated references to the audit are scandalous and immaterial. In fact, the Respondents themselves have admitted that the Audit was not released until after the press release had been

[4] This fact is important because, as Professor Prosser notes, "a publication may clearly be defamatory as to somebody, and yet on its face make no reference to the individual plaintiff . . . he need not, of course, be named, and the reference may be an indirect one, with the identification depending upon circumstances known to the hearers, and it is not necessary that every listener understand it, so long as there are some who reasonably do." Prosser, *Handbook of the Law of Torts*, Fourth Edition (1971), p. 749.

published and, further, that none of the Respondents' statements allude to the Audit Report in any way. (Br. 10). Thus, it can only be assumed that the Respondents' references to the Audit, as well as the other irrelevant and misleading comments inserted in the Respondents' Brief,[5] constitute transparent attempts to prejudice Dr. Hutchinson in the eyes of the Court by portraying him in a highly derogatory manner. Accordingly, these references should be disregarded.

11. As explained in a later section in this Brief dealing with the "public official" issue, the Respondents' Statement of the Case exaggerates the nature and extent of the authority exercised by Dr. Hutchinson in his civil service position with the State of Michigan.[6]

---

[5] Other prejudicial irrelevancies contained in the Respondents' Brief include the reference to Dr. Hutchinson's "personal patent" (Br. 9) and the reference to the "hundreds of thousands of dollars of equipment paid for by the Government [which] were transferred to Hutchinson's private foundation." (Br. 12). Contrary to the Respondents' insinuations, Dr. Hutchinson's "personal patent" resulted from research work performed under a private grant from the Philip Morris Company. Furthermore, the patent was not granted to Dr. Hutchinson alone, but rather to four individuals as assignors to a non-profit corporation. With respect to the "transfer" of Government property to Dr. Hutchinson's foundation, the Respondents artfully leave an implication of wrongdoing without explaining that this "transfer" was expressly approved by both State and Federal officials on the basis of formal written requests and was encouraged by Government officials seeking to continue important research without the need to purchase duplicate equipment. (Hutchinson Depo., pp. 148-150). Moreover, in the event of dissolution, the assets of Dr. Hutchinson's private foundation will be distributed to another tax exempt 501(c)(3) entity. (Hutchinson Depo., p. 432).

[6] Also, in presenting the various dollar figures connected with the funding of Dr. Hutchinson's research, the Respondents have inflated the relevant figures by referring to their own Trial Exhibits 82(b) and 83. (A. 306-309; 312). These Exhibits, however, are fraught with errors. For example, the Respondents' list of Dr. Hutchinson's contracts and grants includes one substantial grant which is added into the total twice and another grant for which funding was never actually received. (A. 312). Also, the figures regarding Dr. Hutchinson's grant applications are substantially inflated by the inclusion of applications which were denied, as well as a large number of applications which were submitted by other researchers, with Dr. Hutchinson merely named as an asistant. (A. 306-309). Also, the Exhibit regarding Applications includes many of the same amounts which are included on the Exhibit regarding Funded Grants. (A. 307, 309, 312). Additionally, the Respondents have misrepresented the time period in question by referring to Dr. Hutchinson's "seven years tenure as research director" but then including grants covering an eleven year period from 1967 through 1978. (A. 312). Finally, the figure which the Respondents unabashedly described as representing the total amount of Dr. Hutchinson's applications to "*Federal* agencies" (Br. 11), includes several substantial *private* grants from the American Medical Association, the National Safety Council, the Council for Tobacco Research and the Philip Morris Company. (A. 308-309).

12. On page 11 of their Brief, the Respondents boldly assert that "new grant proposals to each agency generally include no cost information on continuing grants with other agencies or list other pending applications." This allegation is directly contradicted by the actual grant applications included in the record. For example, each of the grant applications filed as Plaintiff's Trial Exhibits 47 through 57 include a section entitled "other support" or "current research support" or "current support," specifically listing the information which the Respondents claim is not included.

THE RESPONDENTS' PRESS RELEASE AND NEWSLETTERS ARE NOT ENTITLED TO ABSOLUTE IMMUNITY UNDER THE SPEECH OR DEBATE CLAUSE

The relevant authority on this issue is set forth at pages 17 through 30 of the Petitioner's principal Brief. As explained therein, the fundamental rule governing

application of the Speech or Debate Clause is that only "legitimate *legislative* activity" is immune. Many other congressional activities may be entirely legitimate, but they are not immune from normal legal constraints unless they are necessary to congressional deliberations. *Doe* v. *McMillan,* 412 US 306 (1973); *Gravel* v. *United States,* 408 US 606 (1972); *United States* v. *Brewster,* 408 US 501 (1972).

Rather than accept the clear import of this Court's interpretation of Speech or Debate immunity, the Respondents' have charged the Court with rendering "conflicting opinions" which contain "unnecessarily broad generalizations" and "engender confusion." (Br. 33). The Petitioner submits that the confusion on this issue is not to be found in this Court's decisions, but rather in the Briefs of the Respondents and their supporting amici.

The Respondents have dedicated a substantial portion of their Brief to an extensive and rather selective review of English precedent prior to the year 1700, as well as some non-judicial writings from early American history addressing the need for legislators to communicate with their constituents. As an initial observation, it may be noted that the lengths to which the Respondents have gone in attempting to avoid the pertinent Supreme Court decisions in this area should provide a valid indicator of the true state of the law. Moreover, the Respondents' historical analysis is incomplete. For example, two English cases decided shortly after the adoption of the United States Constitution held that the Parliamentary privilege did not immunize members from civil liability for libels contained in privately published reproductions of their Parliamentary speeches. *Rex* v. *Creevy,* 1813, 1 Maule & Selwyn 273; *Rex* v. *Lord Abington,* 1795, 1 Esp. N.P. Cases 228. See

generally T. E. May, Treaties on the Law, Privileges, Proceedings and Usage of Parliament 48-66 (16th ed. E. Fellowes & T. G. B. Cocks 1957).

In 1833, Mr. Justice Story, then Dane Professor of Law at Harvard University, published his famous *Commentaries on the Constitution of the United States,* wherein he commented on the legislative privilege as follows:

> "But this privilege is strictly confined to things done in the course of parliamentary proceedings, and does not cover things done beyond the place and limits of duty. (Jefferson's Manual, Sec 3.) Therefor, although a speech delivered in the house of commons is privileged, and the member cannot be questioned respecting it elsewhere; yet, if he publishes his speech, and it contains libellous matter, he is liable to an action and prosecution therefor, as in common cases of libel. (The *King* v. *Creevy,* 1 Maule & Selw. 273.) And the same principles seem applicable to the privilege of debate and speech in congress. No man ought to have a right to defame others under colour of a performance of the duties of his office. And if he does so in the actual discharge of his duties in congress, that furnishes no reason why he should be enabled through the medium of the press to destroy the reputation, and invade the repose of other citizens. It is neither within the scope of his duty, nor in furtherance of public rights, or public policy. Every citizen has as good a right to be protected by the laws from malignant scandal, and false charges, and defamatory imputations, as a member of congress has to utter them in his seat. If it were otherwise, a man's character might be taken away without the possibility of redress, either by the malice, or indiscretion, or overweaning self-conceit of a member of congress." *Story, supra,* Vol. II, Sec 83.

Still another statement of historical precedent was contained in *McGovern* v. *Martz,* 182 F. Supp 343 (DC DC 1960), where the court cited English precedent in support of its ruling that a Congressman's republication of a defamatory statement by circulating reprints from the *Congressional Record* was not entitled to absolute immunity:

> " 'Though a member of Congress is not responsible out of Congress for words spoken there, though libellous upon individuals; yet if he causes his speech to be published, he may be punished as for a libel by action or indictment. This is the English and the just law. [citing *Rex* v. *Abington,* Esp. 226, Peake 310 (1795); *Rex* v. *Creevy,* 3 Eq. N.P. Cases, 228, 1 M. & S. 273 (1813)]. 1 Kent's Commentaries 249, note c (8th Ed. 1854)." 182 F Supp at 347.

Thus, "the English and the just law" is entirely consistent with the recent pronouncements of this Court reaffirming the limited scope of Speech or Debate immunity.

In their historical analysis, the Respondents as well as the amici have referred to a "protest letter" written in 1797 and several other documents stressing the importance of communications between constituents and representatives. (*e.g.,* Br. 23). In this regard, it is important to stress that the Petitioner does not challenge the importance of such communications, but only their immunity from normal legal constraints. As the Respondents themselves have noted, "the legislature has an informing function which is entirely distinct from the business of adopting legislation." (Br. 24). This informing function is not disputed; the issue is whether an individual member of Congress purporting to "inform the public", has absolute immunity to maliciously defame an individual citizen in connection with a widespread multi-media publicity program. This case does not involve limitations on distribution of information, but rather limitations on the scope of absolute immunity.

As the Respondents have admitted, the limited scope of Speech or Debate immunity has not prevented the creation or operation of a "vast statutory network" enabling Congress to communicate with and inform the public and each other. (Br. 27-30). Indeed, the effective operation of this communications network in the context of limited Speech or Debate immunity tends to refute the Respondents' argument that greater immunity is essential to effective communications between Congress and the public. In fact, given the Respondents' premise that a legislator will not communicate with his constituents in the absence of absolute immunity, logic dictates that the constituents might likewise be unwilling to communicate with their legislators in the absence of a similar, absolute immunity for themselves. Certainly the Respondents are not arguing for such an all-encompassing immunity, but it seems to be the logical result of their argument.

This fact is apparent from numerous references in the Briefs filed by the Respondents and the amici. For example, at page 23, the Respondents refer to the need for communications "*between* representatives and their constituents." Similarly, the amici representing the United States Senate quote Senator Metcalf regarding the need for the American people and the Congress to "*exchange* information." (Br. 6). According to the Respondents and amici, this "exchange" of information "between Congress and the public justifies a rad-

ical expansion of the Speech or Debate privilege to include all such communications. The ostensible rationale behind this conclusion is that input from the public is essential to Congressional deliberations. Even assuming that this is true, it must be recognized that the supposedly essential information is that which is transmitted *from* the constituent *to* the legislator. Thus, the side of the communication which the Respondents propose to immunize is, according to their own analysis, less important than the side of the comunication which they cannot possibly fit within the language of the Speech or Debate Clause, since that Clause is expressly limited to "senators and representatives." Consequently, it becomes apparent that the Speech or Debate Clause was not intended to immunize the communications between legislators and the public. Indeed, if the drafters of our Constitution had sought to immunize such communications, it would have been a simple matter to insert a clause providing absolute immunity to every citizen in connection with any communication to or from a member of Congres on a topic of Congressional concern. The plain fact is that our Constitution does not contain such a clause, but rather contains a carefully limited statement of immunity in connection with "Speech or Debate in either House."

In arguing for an extension of absolute immunity to the informing and other non-legislative functions of Congress, the Respondents and amici have apparently lost sight of the exact language of the Constitution. The Speech or Debate Clause is specifically limited to "Speech or Debate *in* either House" and prohibits questioning "in any *other* place." Thus, the Clause is very similar to the English Bill of Rights which provides that "the freedom of speech and debates on proceedings *in* Parliament ought not to be impeached or questioned in any court or place *out* of Parliament." Therefore, to extend the privilege to the extent proposed by the Respondents would be to ignore the literal as well as historical scope of the Clause.

The interpretation proposed by the Respondents would also be inconsistent with the decisions of this Court construing the scope of Speech or Debate immunity. These cases and the principles enunciated therein have been set forth in the Petitioner's principal Brief and need not be repeated here. It should suffice to note that the Respondents' attempts to avoid application of the relevant principles to the instant case are unavailing. With respect to the *Brewster* decision, for instance, the Respondents and the Senate amici contend that the court erred in its statement that newsletters and news releases are "political in nature rather than legislative" and that "it has never been seriously contended that these political maters, however, appropriate have the protection afforded by the Speech or Debate Clause." *United States* v. *Brewster, supra,* at 512. Directly challenging this Court's conclusion, the Respondents and amici have asserted that, in fact, "it had never seriously been contended that such matters as newsletters and news releases were *not* within the protections of Congressional immunity." (Resp. Br. 34; Sen. Br. 18). This contention is completely fallacious. As explained above, Mr. Justice Story, speaking 140 years before the *Brewster* decision, explained that republication of a libellous floor speech "through the medium of the press" would lie outside the scope of the legislative privilege. *Story, supra,* Vol. II, Sec. 863. Also, two early English cases held that the analogous Parliamentary privilege did not shield private republi-

cations from civil liability. *Rex* v. *Creevy, supra; Rex* v. *Lord Abington, supra.*

Long v. *Ansell,* 69 F. 2d 386 (DC CA 1934), affirmed 293 U.S. 76 (1934), is another case which directly contradicts the Respondents' assertion that no one had ever seriously contended that newsletters and press releases were outside the scope of Congressional immunity:

> "A Senator of the United States is here charged with publishing in the District of Columbia, and circulating here and throughout the Country, libelous and defamatory articles, alleged to be a reprint of a speech made on the floor of the Senate. *The charge here is not for slander resulting from a speech made on the floor of the Senate, but for libel in publishing and distributing a copy of that speech, together with a letter calling special attention to the article.*
>
> Defendant pitches his defense upon the exemption from arrest, and not upon his exemption from responsibility for statements made in his speech on the floor of the Senate. *But were that claim advanced, it would be without force,* since the acts charged have only remote connection with the speech. While the published articles were in part reproductions of the speech, the offense consists not in what was said in the Senate, but in the publication and circulating of the libelous documents." 69 F 2d at 389. (Emphasis added).

More recently, the court in *McGovern* v. *Martz, supra,* decided that a Congressman's circulation of reprints from the *Congressional Record* was not entitled to absolute immunity. *McGovern* represents not only a "serious contention" that Speech or Debate immunity is inapplicable to newsletters and press releases but also a direct holding to that effect.

In fact, this principle, which the Respondents and amici assert was never seriously contended, is actually so well established that it was officially recognized in one of Congress' own documents. A booklet entitled, "The Constitutional Privileges from Arrest and of Speech or Debate of Members of Congress, U. S. Constitution, Article I, Sec. 6" (JK 1052 A-73-86 A) (3rd Edition 1972), prepared by the Congressional Research Service, contains the following "serious contention":

> "The *McGovern* case indicates that unofficial circulation by Members of Congress of copies of the *Congressional Record* and of reprints therefrom containing libels, constitutes publication of the libel without protection of their constitutional privileges." (at p. 34).

All of the preceding authorities, including the statements by the Congressional Research Service, directly support this Court's decision in *Brewster* and, correspondingly, contradict the biased and unsupported assertions of the Respondents and amici.

The Respondents' analysis of the decision in *Gravel* v. *United States, supra,* is equally deficient. Because *Gravel* involved a criminal act prohibited by Congress, the Respondents have argued that the scope of Speech or Debate immunity should be determined by the Congressional authorization or prohibition of the act in question. (Br. 39). In other words, acts authorized by Congress would be immune and acts prohibited by Congress would not be immune. If the Respondents' specious analysis were accepted, however, Congress could effectively amend the Constitutional Speech or Debate Clause by simply legislating greater immunity for itself. The absurdity of such a result should be obvious.

The Respondents' strained application of *Doe* v. *McMillan, supra,* to the facts of the instant case similarly fails to withstand scrutiny. According to the Respondents, the decision in *Doe* affords complete immunity to their international publicity release, as well as the subsequent television, radio and press interviews. In reaching this conclusion, the Respondents conveniently overlook the following statement from this Court's opinion in *Doe:*

> "A Member of Congress may not with impunity publish a libel from the Speaker's stand in his home district, and clearly the Speech or Debate Clause would not protect such an act even though the libel was read from an official committee report. The reason is that republishing a libel under such circumstances is not an essential part of the legislative process and is not part of that deliberation process 'by which members participate in committee and House proceedings.'" 412 U.S. at 314-315.

The issue in *Doe,* as in all other Speech or Debate cases, concerned the "legitimate legislative needs of Congress" and the matter was remanded for a determination as to whether the level of public distribution in that case exceeded these "legitimate legislative needs." On remand, the United States Court of Appeals for the District of Columbia Circuit found that the case involved a "limited distribution" of an official government report to those on a standard distribution list with a general interest in all matters before Congress. The limited distribution in *Doe* stands in stark contrast to the distribution in the instant case which the amici representing the House of Representatives frankly characterized as "the widest possible dissemination." (Br. 10). Indeed, the text of the Petitioner's principal Brief details the comprehensive international media distribution undertaken by the Respondents through the use of newspapers, magazines, press interviews, newsletters, radio interviews, telephone conversations and television shows. Clearly, the widespead distribution in this case is readily distinguishable from the limited distribution in *Doe* v. *McMillan.*

Other distinguishing characteristics between *Doe* and the instant case include the fact that, in *Doe,* "no attempt [was made] to call attention to the report or its contents." Also, "distribution ceased as soon as objections to the reports contents were received." Additionally, *Doe* involved an official Congressional report rather than the press release and media statements of an individual member of Congress. In the words of *Watkins* v. *United States,* 354 U.S. 178 (1957), this case presents a classic attempt to "expose for the sake of exposure." If this conduct is sanctioned and immunized by the Court in this case, then the "limited distribution" test will be reduced to a meaningless sham and the scope of Speech or Debate immunity will be virtually unlimited.

The practical effect of recognizing the so-called "informing function" as constituting "legitimate legislative activity" would be to extend absolute immunity to virtually every statement ever made by any member of Congress. This conclusion is even supported by the language contained in the amici's Briefs. On page 11 (fn. 16) of their Brief, the amici representing the Senate present the following definition of "public spending":

> "We refer to funds taxed under the authority of Congress, expenditures authorized by the Congress, and funds appropriated by the Congress . . .

> *every step of that process* from public resources to public use of the funds is our business. How they are spent, who receives the funds and for what and how the funds are used, are all part of the process and thus part of our legislative business."

Under this definition, a member of Congress would arguably enjoy absolute immunity to falsely and maliciously charge an individual citizen (and perhaps his political opponent) with tax fraud. Despite the false and malicious nature of the allegation, the Congressman would be arguably immune because the payment of federal taxes is a matter of legitimate congressional concern.

Even more revealing is the language at page 14 of the Brief submitted by the amici representing the House of Representatives:

> "In a real sense, the appropriations process has *no beginning and no end;* it is a continuous function which spans calendar, fiscal and sessional periods." (Br. 14).

If the appropriations process has no beginning and no end and if all communications related to the appropriations process are entitled to absolute immunity, then logic dictates that Speech or Debate immunity has no beginning and no end. To avoid this absurd result, this Court has repeatedly emphasized that congressional conduct is not immune merely because it is related to the legislative process:

> "We would not think it sound or wise, simply out of an abundance of caution to doubly insure legislative independence, to extend the privilege beyond its intended scope, its literal language and its history, to include all things in any way related to the legislative process. Given such a sweeping reading, we have no doubt that there are few activities in which a legislator engages that he would be unable somehow to 'relate' to the legislative process." *United States* v. *Brewster,* 408 U.S. 501, 516 (1972).

This same rationale should be applied to reject the Respondents' arguments in this case.

THE TORTIOUS PHONE CALLS DURING WHICH RESPONDENT SCHWARTZ DEFAMED DR. HUTCHINSON AND URGED VARIOUS AGENCIES TO TERMINATE HIS FUNDING ARE NOT ENTITLED TO ABSOLUTE SPEECH OR DEBATE IMMUNITY

As explained in an earlier section of this Brief, this issue exceeds the scope of the issues raised in the Petition for Writ of Certiorari and, therefore, in the absence of a cross-petition, should be disregarded. Furthermore, even if the Respondents' arguments regarding the investigative and oversight functions are considered, it should be noted that Respondent Schwartz's information-gathering activities are not at issue in this case. Dr. Hutchinson's Complaint does not challenge the Respondents' requests for information, but rather the Respondents' affirmative statements to various government agencies encouraging them to terminate Dr. Hutchinson's funding. Consequently, the frequent references to "information gathering" and "the investigative function" contained in the Respondents and amici's Briefs are simply irrelevant.

With respect to the phone calls which are actually at issue, the dispositive question must be whether these calls constitute "legitimate legislative activity" necessary to Congressional deliberations. The amici repre-

senting the House of Representatives apparently disagree with this well-established test and assert that:

> "[R]egardless of whether Senator Proxmire's follow-up calls were part of an overall effort to 'legislate' control over the funds in question, they should nevertheless be accorded spech or debate treatment since Congress has historically employed continuous supervision of public expenditures as one way of implementing its Article I, Taxing and Spending Powers." (Br. 22).

This assertion runs directly contrary to all applicable precedent regarding the scope of the Speech or Debate Clause, including the decision in *Doe, Gravel* and *Brewster*. As the amici representing the House have pointed out, there are "myriad means available to oversee the executive branch." (Br. 29). Some of these "means," such as the oversight subcommittees which exist on all standing committees (Br. 25) and the specific legislation govering the expenditure of appropriated funds (Br. 17), constitute legitimate legislative activities and are thus immune. Other methods of oversight, however, such as pressure contacts by individual senatorial aides, are available to members of Congress, but are not entitled to absolute immunity since they are not part of the legislative/deliberative process. As stated by this court in *United States* v. *Johnson,* 383 U.S. 169 (1966):

> "No argument is made, nor do we think it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process." 383 U.S. at 172.

Likewise, in *Gravel* v. *United States,* supra, this Court stated as follows:

> "Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole, and exhort with respect to the administration of all Federal statutes—but such conduct, although generally done, is not protected legislative activity." 92 S. Ct. 2627.

Even the dissenting Justices in the *Gravel* case would agree with the preceding point:

> "I agree with the Court that not every task performed by a Legislator is privileged; intervention before executive departments is one that is not." Dissenting Opinion of Justices Brennan, Douglas and Marshall, 92 S. Ct. 2639.

After reviewing the preceding authorities, there should be little doubt regarding the unprivileged nature of Respondent Schwartz's tortious telephone calls.

DR. HUTCHINSON WAS NOT A PUBLIC OFFICIAL

As explained in the first section of this Reply Brief, the issue of Dr. Hutchinson's alleged status as a "public official," is not properly before this Court. Nevertheless, the following analysis is presented for reference in the event that this Court decides to address the issue.

In *New York Times* v. *Sullivan,* 376 U.S. 254, 283 n. 23 (1964), this Court specifically declined to define the term "public official," but later in *Rosenblatt* v. *Baer,* 383 U.S. 75 (1966), this Court established general standards for determining whether an individual should be so classified:

> "Where a position in government has such apparent *importance* that the public has an independent interest in the qualifications and performance of

> the person who holds it, *beyond the general public interest* in the qualifications and performance of all government employees, both elements we identified in *New York Times* are present and the *New York Times* malice standards apply." 383 U.S. at 86. (Emphasis Added)

Thus, to be properly deemed a public official, an individual must hold a position of such importance that he is the subject of public attention "*beyond* the general public interest." His position must be more significant than that held by the average bureaucrat or management-level civil service employee. A typical government official who catches the public interest only when he is defamed is *not* a "public official" within the meaning of *New York Times* v. *Sullivan:*

> "A conclusion that the *New York Times* malice standards apply could not be reached merely because a statement defamatory of some person in government employ catches the public interest; that conclusion would virtually disregard society's interest in protecting reputation. The employee's position must be one which would invite public scrutiny and discusion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." *Rosenblatt* v. *Baer, supra,* at 86.

The scope of "public official" status was even more specifically defined in a District Court opinion where the category was held to be:

> ". . . *limited to high-ranking government officials.* It does *not* comprehend the entire government personnel. The host of federal, state, municipal and local government administrators, *scientists,* lawyers, physicians, secretaries, clerks, inspectors of various kinds, policemen, firemen, letter carriers,

> mechanics, laborers, and others, are not affected and are not deprived of their rights under the law of libel. By entering government employment, a person does not lose any of his civil rights. The exception is limited to high-ranking government officers in order to secure the constitutional freedom for every citizen to discuss and criticize his government." *Clark* v. *Pearson,* 248 F. Supp. at 193-4 (Emphasis Added).

It is significant to note that the court in *Clark* specifically stated that government administrators and scientists would not be deprived of their civil rights merely because they are employed by the government. With this in mind, it is appropriate to now consider the specific grounds for the District Court's decision, not considered on appeal, that Dr. Hutchinson was a "public official."

First, the District Court noted that Dr. Hutchinson was "Director of Research" at Kalamazoo State Hospital. Apparently, the court merely assumed that an impressive title alone elevates a government employee to a "high-ranking government position" of such importance that he would attract attention "beyond the general public interest." Considering the fact that government bureaucracies are notorious for attaching impressive-sounding titles to relatively insignificant positions, the court's assumption seems unfounded. Furthermore, as explained below, Dr. Hutchinson's position was far from "high-ranking."

Despite his title as "Director," Dr. Hutchinson did not even possess the power to personally hire or fire his subordinates. (A. 301). Furthermore, he did not and could not participate in any institution-wide administrative meetings. (A. 301). He also lacked any pro-

gram planning authority for directing the policies of the institution. (A. 301). Moreover, at the time of Defendant Proxmire's statements, Dr. Hutchinson had direct control over only 10 or 11 employees, some of whom were merely students working part-time. (A. 301). Consequently, Plaintiff occupied a position of authority inferior to such other hospital employees as the Director of Domestic Services, the Power Plant Supervisor, the Nursing Ward Supervisors and the Maintenance Supervisor. Under these facts, it does not seem probable that Dr. Hutchinson would have attracted any attention, let alone widespread attention "beyond the general public interest."

The second supposed ground for classifying Dr. Hutchinson as a public official was that "he was dealt with as a responsible public official by the federal agencies that funded his research." (Br. 53). This justification erroneously equates trustworthiness with high rank. The test is not whether a person is a government official or even a responsible government official, but whether he is a "high-ranking government official" who attracts attention "beyond the general public interest." *Rosenblatt* v. *Baer, supra; Clark* v. *Pearson, supra.* The mere fact that a scientist or any other government employee is trusted to do his job should not deprive him of the legal right to protect his reputation.

The District Court's third and final reason for finding Dr. Hutchinson to be a public official was that he was president of a tiny non-profit foundation. This rationale is unconvincing for at least two reasons. First, the size of the foundation was negligible. (Hutchinson Depo., pp. 141-144). Second, the foundation was *private,* not governmental. *Rosenblatt* v. *Baer, supra,* refers to "a position in *government*" and *Clark*

v. *Pearson, supra,* specifically limits the public official category to "high-ranking *government* officials." The rule obviously does not embrace the officers of small private foundations.

To the District Court's three reasons, the Respondents' have attempted to add a fourth supposed justification for treating Dr. Hutchinson as a public official. This fourth rationale is based on the level of funding received by the institutions where Dr. Hutchinson worked. The errors in the Respondents' cost figures have already been discussed in footnote 6 of the previous section of this Brief regarding the inaccuracies in the Respondents' Statement of the Case and need not be repeated here. Even if the Respondents' inflated figures were accurate, however, the funding level would not convert Dr. Hutchinson into a public official.

As explained at page 35 of the Petitioner's principal Brief, Dr. Hutchinson did not personally receive any federal research funds. Furthermore, all of the grants involved in the instant case were awarded to the State of Michigan and were administered by persons outside of Dr. Hutchinson's department. The money was dedicated exclusively to purchasing equipment and supplies and to paying the wages of researchers other than Dr. Hutchinson. In fact, during the period in question, the only public funds paid directly to the Petitioner were contained in his salary as a State Civil Service employee. (A. 292-293; 299). Moreover, it is simply false to assert, as the Respondents have asserted, that Dr. Hutchinson exercised complete control over these funds and was "virtually answerable to no one." (Br. 55). Dr. Hutchinson could not embark upon a particular research project without the approval of the superintendent of the Kalamazoo State Hospital and the di-

rector of the Michigan State Department of Mental Health. Further, his grant applications, if approved at these first two levels, would be scrutinized by the relevant agency's peer review committee and assigned a priority rating by other agency officials.

Even if the technical aspects of a particular research proposal were approved at all of the stages mentioned above, Dr. Hutchinson would still lack the authority to control the funding matters. All funding requests were handled by the assistant superintendent of the hospital with advisory copies being sent to the Department of Mental Health. Thereafter, each funding request would also be scrutinized by the agency's program staff and peer review unit.

Similarly, Dr. Hutchinson could not issue purchase orders but merely purchase requests to the hospital's purchasing department. Also, the accounting records regarding the hospital's research were maintained by the hospital's accounting department and not by Dr. Hutchinson. Consequently, it is unfair to cite the grand total of all of the research funds connected with 11 full years of Dr. Hutchinson's research (A. 312), and then portray Dr. Hutchinson as an omnipotent czar possessing the unrestricted authority to spend this money in any manner he chooses. It is much more accurate to view Dr. Hutchinson as a typical government scientist subject to the usual bureaucratic constraints and supervision.

In summary, Dr. Hutchinson was an average government researcher when he was defamed. He was neither a "high-ranking government official" (*Clark, supra*), nor a person who attracted attention "beyond the general public interest in the qualifications and

performance of all government employees." (*Rosenblatt, supra.*) In short, he was not a "public official" and, therefore, the *New York Times* rationale does not require that his legal rights be curtailed.

DR. HUTCHINSON WAS NOT A PUBLIC FIGURE

With respect to the public figure issue, there are two significant areas of agreement between the parties. First, it is agreed that Dr. Hutchinson did not possess "general fame or notoriety" sufficient to elevate him to the level of an "all-purpose public figure." (Respondents' Br. 57). Second, it is agreed that the relevant test for limited issue public figure status is whether an individual has "thrust himself to the forefront of a particular public controversy in order to influence the resolution of the issues involved." *Gertz* v. *Welch,* 418 U.S. 323, 345 (1974).

The areas of disagreement between the parties involve the appropriate interpretation of the above-cited legal standard, as well as certain factual disputes. With respect to the application of the *Gertz* test, the Respondents contend that a person may become a "limited issue public figure" even though he does not assume a role of advocacy in connection with a particular public controversy. (Br. 58-59).[7] The error in the Respondents' position is revealed by simply considering the precise language of the *Gertz* test, indicating that pri-

[7] In footnote 71 on page 59 of their Brief, the Respondents note that Coach Butts in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967), attained public figure status without attempting to influence a particular public controversy. This analysis, however, is spurious since Coach Butts was not a limited issue public figure, but rather an all purpose public figure who possessed general fame or notoriety as a result of his highly publicized career.

vate citizens do not become limited issue public figures unless they have "*thrust themselves* to the forefront of particular public controversies *in order to influence* the resolution of the issues involved." (Emphasis Added). The plain meaning of this Court's language in *Gertz* is that a limited issue public figure must seek "to influence the resolution" of issues in a "public controversy." In other words, he must maintain or advocate a particular position in that controversy. This conclusion seems inescapable.

Even if conduct short of advocacy is sufficient to satisfy the *Gertz* test, Dr. Hutchinson would still not be a public figure. At the time he was first defamed by the Respondents, Dr. Hutchinson was not involved in any way with any particular public controversy. The only controversy arose *after* the Respondents publicly attacked him. Certainly, the Respondents should not be allowed to use this subsequent controversy to "bootstrap" Dr. Hutchinson into the position of a public figure at the time of his initial defamation. *Gertz* clearly requires that public figure status be limited to those who have "voluntarily exposed themselves to increased risk of injury from defamatory falsehoods concerning them."

Other than the "advocacy" issue discussed above, the only other fundamental differences between the parties with respect to the public figure issue involve disputes over the facts. To a certain extent, these factual disputes provide some indication of the inappropriateness of deciding this case on a Motion for Summary Judgment. Most of the factual disputes result from the Respondents' inattentiveness to the record.

For example, on page 62, the Respondents refer to Dr. Hutchinson's publication of "four books" when the record actually reveals that Dr. Hutchinson never published any books, but merely authored individual chapters in books written by others. (Pl. Exs. 68, 69, 71-73). Moreover, these chapters concerned highly technical esoteric matters which received no significant public attention.

Another factual misstatement is inherent in the asserted distinction between Dr. Hutchinson and "civil servants and others drawing fixed stipends." (Br. 61). In fact, the record indicates that the only public funds received by Dr. Hutchinson during the period in question were contained in his salary as a civil service employee of the State of Michigan. (A. 302). Several other factual errors are included in the Respondents' discussion of the public figure issue, but most of these have already been addressed in the earlier portion of this Brief regarding the Respondents' Statement of the Case.

The principal deficiency in the Respondents' position is that they attempt to elevate Dr. Hutchinson to public figure status on the basis of a public controversy which did not arise until after the distribution of the defamatory press release. If accepted by this Court, this "bootstrap" approach to public figure analysis could significantly increase the number of private individuals subjected to the rigorous "actual malice" standard of *New York Times* v. *Sullivan*. Since these private individuals, like Dr. Hutchinson, have not voluntarily relinquished any part of their interest in the protection of their reputations, the Respondents' argument should be rejected.

THE RECORD PRESENTS A GENUINE ISSUE OF MATERIAL FACT REGARDING THE RESPONDENTS' MALICE

Even if the "actual malice" standard of *New York Times* v. *Sullivan* is applied to the instant case, the record contains sufficient evidence to raise a genuine issue of material fact regarding the Respondents malice.[8] The Respondents', of course, deny the existence of malice and assert that all of their statements were either "opinion or readily apparent use of colloquial expression." (Br. 67). The falsity of this description has already been addressed in the earlier portion of this Reply Brief concerning the "Questions Presented" in the Respondents' Brief. One additional point, however, is worthy of mention. While the Respondents contend that their statements were merely opinion or harmless colloquialisms, rather than factual allegations of misconduct, the American Society of Newspaper Editors and the National Newspaper Association, as amici curiae, have specifically referred to the Respondents' statements as allegations of "misconduct." (Br. 7). Thus, even the amici who support the Respondents'

[8] The malice standard, of course, would not apply unless Dr. Hutchinson were deemed to be a public official or a public figure. Furthermore, although we have assumed that the *New York Times* privilege applies equally to media and non-media defendants, this issue has not yet been decided. As Mr. Chief Justice Burger stated in his concurring opinion in *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 798 (1977), "the Court has not yet squarely resolved whether the Press Clause confers upon the 'institutional press' any freedom from government restraint not enjoyed by all others." Mr. Justice Stewart has expressed the opinion that the First Amendment reference to "freedom of speech *and* of the press" implicitly indicates a special privilege for the press. Stewart, "Or of the Press," 26 *Hastings Law Journal*, 631 (1975); Wade, The Communicative Torts and the First Amendment, 48 *Mississippi Law Journal* 671, 698 (1977).

position have contradicted the Respondents' assertion regarding the absence of factual misstatements.[9]

The specific factual misstatements, examples of ridicule and the evidence of malice are set forth in the Petitioner's principal Brief and thus require no recitation here. The Respondents' treatment of some of these factual misstatements, however, invites attention at this point.

With respect to the charge that Dr. Hutchinson's research projects were "perhaps duplicative," the Respondents do not deny their awareness of the Memorandum finding "no overlap," but they claim that two documents in the record support their charge of duplication. The language in both of these documents speaks for itself and clearly concerns proposed work, rather than funded work. (Defendant's Ex. 90; A. 57).[10]

[9] Of course, some of the Respondents' statements of opinion are also actionable. Section 556 of the Restatement of Torts, 2d, was written after the decision in *Gertz* and accurately describes the current state of the law with regard to defamatory statements of opinion as follows: "All simple expression of opinion based on disclosed or assumed non-defamatory facts is not in itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. But an expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based, is treated differently. The difference lies in the affect upon the recipient of the communication. In the first case, the communication itself indicates to him that there is no defamatory factual statement. In the second, it does not, and the recipient draws the reasonable conclusion that the derogatory opinion expressed in the comment must have been based on undisclosed defamatory facts, the Defendant is subject to liability." Comment C, § 566, Restatement of Torts, 2d (1977).

[10] The reference in Defendant's Exhibit 90 to Dr. Hutchinson's tendency to "fragment" his work obviously fails to support the Respondents' position for the simple reason that fragmentation

With respect to the charge that Dr. Hutchinson received a personal fortune of $500,000.00 through his research activities, the Respondents have admitted that the attribution of direct funding to Hutchinson was incorrect (Br. 73), but they claim that Dr. Hutchinson was actually making a fortune from his research because he was "among the top percentage of incomes in the country." (Br. 73). In the interest of accuracy, it should be noted that Respondent Schwartz himself has admitted that, at the time of the publicity release, Dr. Hutchinson was earning a salary of $30,000.00 a year. (A. 210).

Notably absent from the section of the Respondents' Brief dealing with the issue of malice is any response to the evidence demonstrating the Respondents' established pattern of malicious defamation of social scientists. Also absent is any response to the Petitioner's contention that the Respondents were aware of the true nature and extent of Dr. Hutchinson's research but knowingly chose to misrepresent and ridicule that research in their various public statements. Similarly, there is no explanation as to why the Respondents proceeded to publish and republish their defamatory statements even after Dr. Hutchinson had specifically advised them that these statements were inaccurate.

---

is different than duplication. The reference to "similar studies using other drugs" in the HEW Report (A. 57) also fails to support the Respondents' position since even Senator Proxmire's own press release distinguishes between similar projects and duplicative projects (P. 85).

In view of the considerable evidence demonstrating the Respondents' malice in this case, it was particularly inappropriate to dismiss Dr. Hutchinson's Complaint on a Motion for Summary Judgment. As noted by the Respondents (Br. 67) and the supporting amici (Br. 9), the actual malice standard of *New York Times* requires an assessment of the defendant's subjective awareness of falsehood or reckless disregard of the truth. This subjective issue should not have been decided on a motion for summary judgment:

> "We think that in a libel case, as in other cases, the party against whom a motion for summary judgment, a motion for a directed verdict, or a motion for a judgment notwithstanding the verdict is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of fact. We think, too, that in such cases it is not only not the duty of the judge, or of this court of appeal to weigh the credibility of the evidence, or to draw inferences in favor of the moving party (except, of course, when no contrary inference can legitimately be drawn), but that neither the judge nor this court on appeal has the authority to weigh credibility or to choose among legitimate inferences in such cases." *Guam Federation of Teachers, Local 1581, A.F.T.* v. *Ysrael,* 492 F.2d 438, 441 (1974).

When the above-cited principle is applied to the facts of the present case, including the substantial evidence of both the falsity and malice of the Respondents' statements, it becomes readily apparent that summary judgment was wholly inappropriate in this case.

CONCLUSION AND RELIEF SOUGHT

Under the facts of this case, justice requires that Dr. Hutchinson be granted a full trial on the merits. Therefore, the Petitioner hereby respectfully prays that the decision of the United States Court of Appeals for the Seventh Circuit be reversed and the Case remanded for further proceedings in accordance with the opinion of this Court.

MICHAEL E. CAVANAUGH
DAVID F S. MARVIN
FRASER TREBILCOCK DAVIS & FOSTER
1018 Michigan National Tower
Lansing, Michigan 48933
Telephone (517) 372-0235

Attorneys for Petitioner

Dated: April 12, 1979